

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW &  
POLICY

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF  
ECOLOGY, and CITIES OF RICHLAND,  
KENNEWICK, PASCO and WEST  
RICHLAND

Respondents

No. \_\_\_\_\_

NOTICE OF APPEAL

(Order granting Surface Water Application

No. S4-30976)

**I. APPEALING PARTY**

The appealing party is:

Center for Environmental Law & Policy  
Karen Allston, Executive Director  
2400 North 45<sup>th</sup> Street, Suite 101  
Seattle, Washington 98103  
Tel. (206) 223-8454  
Fax (206) 223-8464

The appealing party is represented by:

Shirley Waters Nixon  
Center for Environmental Law & Policy  
2400 North 45<sup>th</sup> Street, Suite 101  
Seattle, Washington 98103  
Tel. (206) 223-8454  
Fax (206) 223-8464

Appellant Center for Environmental Law & Policy (CELP) is a non-profit corporation registered in the State of Washington. CELP's members live, work, recreate, aesthetically enjoy, and use the waters in and along Washington's streams and rivers. CELP's motto, "Clean, Flowing Waters for Washington" summarizes CELP's mission to protect and restore the natural integrity, sustainability, and enjoyment of the State's water resources. CELP's goals include furthering the development of sound and effective state water management policies that will benefit the public and the wildlife that depend on clean, flowing, and sustainable water resources.

As an integral part of its work, CELP also has a water rights monitoring project that is devoted to overseeing the administration and enforcement of the Water Code, including decisions on applications for new water rights. A goal of this monitoring is to ensure that such decisions allocate water resources in a manner that is in the public interest, and in conformance with CELP's mission to protect imperiled aquatic ecosystems.

CELP has a consistent history of voicing the concerns of its members regarding river flows, water quality, and water quantity in the Columbia River. From at least 1996 onward, CELP has collected information and been in frequent communication with Department of Ecology (DOE) Water Resource staffers and others involved with water right application involving the Quad Cities. For example, CELP sent a ten-page letter in September, 1997 asking Ecology to stay or deny the Quad Cities application. CELP later supplied comments on the proposed Supplemental Environmental Impact Statement, wrote Ecology repeatedly expressing concerns about the application, and provided written comments during the agency consultation process. In July 2002, CELP wrote again to enumerate flaws in the then-circulating draft of a contemplated Quad Cities ROE, and questioned Ecology's authority to approve it. CELP has continued to point out that should Ecology issue the Quad Cities permit, it will be in violation of the state water code and federal law, and will frustrate federal, state, and private efforts to augment Columbia river flows for salmon recovery.

## **II. PARTIES**

In addition to the appealing party, CELP, the parties to this appeal are the Washington Department of Ecology, P.O. Box 47600, Olympia, WA 98504-7600, which issued the determination and order in Surface Water Right Application S4-30976, and the Washington Cities of Richland, Kennewick, Pasco and West Richland ("Quad Cities") to whom the water right was issued. Addresses of the latter are: City of Richland, PO Box 190, Richland, WA 99352; City of Kennewick, PO Box 6108, Kennewick, WA 99336; City of Pasco, 525 N. 3<sup>rd</sup> Ave. Pasco, WA 99301; City of West Richland, 3805 Van Giesen Street, West Richland, WA 99353.

## **III. ORDER OR DECISION APPEALED FROM**

Appellant Center for Environmental Law & Policy (CELP) appeals from the Washington Department of Ecology's November 19, 2002 Report of Examination (ROE) that constitutes Ecology's determination and Order regarding Surface Water Application No. S4-30976.

## IV. FACTS

### A. Summary

After a corrupted and tortured procedural history that included abandonment of the application by the original applicant, preliminary permit death by neglect, reincarnation and metamorphosis into a divided and expanded form, de-facto euthanasia, unprecedented intermeddling by the legislature, and direct and collateral litigious attacks, Ecology issued on November 19, 2002 a Report of Examination constituting its decision to grant the “Quad Cities” of Richland, Kennewick, Pasco, and West Richland the right to divert 178 cfs from the mainstem of the Columbia River for year-round use. Copies of the 1991 application by the City of Richland, and the resulting 2002 ROE issued to the Quad Cities, are attached.

During the pendency of the application, Ecology failed to conduct its own independent State Environmental Policy Act (SEPA) analysis for this major action. It likewise failed to determine the amount of water available for appropriation from the Columbia, and whether the health of the river and the entities dependent upon the river would suffer adverse impacts as a result of this and other new water withdrawals. In short, Ecology did insufficient study and analysis to justify the conclusion that issuing this permit will not impair existing rights and harm the public interest.

### B. The Columbia River

#### *Aquatic Resources of the Columbia River*

The Columbia River is the lifeline of an extraordinary ecosystem. The mainstem itself is 1200 miles long, encompassing a huge region comprised of western Montana, northern Nevada, Idaho, eastern Oregon, southeastern British Columbia and all of eastern Washington. The Columbia serves as source of hydropower production, as a major shipping waterway for agricultural products from the interior regions, and as a source of water for communities and economies throughout the region.

It is, however, the fishery resources of the Columbia River that are legendary. Historic estimates of returning fish populations range between 10 to 16 million adult salmon annually. The many Native American tribes of the Columbia basin relied upon salmon for ceremonial, sustenance and trade purposes. After Euro-American settlement, non-tribal communities also heavily depended on fish production as a source of economic survival.

Unfortunately, the fisheries of the Columbia River are now estimated at less than 10% of their historic numbers – a figure that represents both hatchery and wild stocks. Thirteen salmonid populations have been listed as threatened or endangered under the federal Endangered Species Act (ESA). As discussed below, federal, tribal and state efforts to restore the salmon fisheries are nothing short of extraordinary.

The National Marine Fisheries Service (NMFS), the federal agency that administers the ESA for salmon, has pegged the loss of Columbia River fisheries to a number of causes. One chief factor, the disruption and depletion of instream flows, is attributed to different uses of the River including the diversion of water for irrigation, industrial and municipal uses. NMFS has established flow targets for the Columbia River in an effort to ensure that adequate water is flowing at the times that salmon need it to migrate up and down the Columbia corridor and spawn in the few reaches of suitable habitat still remaining in the mainstem.

Water quality is another factor that affects fish survival and other beneficial uses of the river. The Columbia River at the Quad Cities is designated as "Class A" under Washington's water quality standards. As a Class A river, the water quality of the Columbia must meet or exceed all characteristic uses, including fish migration, rearing, spawning and harvesting, wildlife habitat, recreation (including primary contact, sport fishing and aesthetic enjoyment), and commerce and navigation. The Columbia River does not presently support all these characteristic uses. The Columbia is also listed on the 1998 303(d) list as water-quality impaired at various points for flow-related pollution criteria, including temperature, dissolved oxygen and dissolved gas.

The Quad Cities proposal abuts two important federal reserves: the McNary Pool Wildlife Refuge and the Hanford National Monument. Both of these reserves provide important habitat for fish and other species, and are dependent upon instream flows of adequate quantity and quality. Both are affected by continued depletion of water from the Columbia River.

The appropriation of any new water from the Columbia River will exacerbate already dire conditions and contradict the public interest in restoration of fisheries and successful use of substantial public monies to achieve restoration.

#### *Water Appropriations from the Columbia River*

Washington state-issued water rights significantly reduce flows in the Columbia, adversely affecting fish habitat and reducing fish production. A staggering amount of water is tied up in water right permits, certificates and claims - mostly for irrigation which depletes river flows at a time when river levels are at their lowest. A 1999 study by the U.S. Bureau of Reclamation revealed that Ecology has issued over 200,000 cubic feet per second (cfs) of irrigation water rights, nearly 8 million acre-feet per year during the April-November agricultural season, for surface and ground water rights above McNary Dam. On the Snake River, a major tributary to the Columbia, another 110,000 cfs in water rights, about 4 million acre-feet annually, have been granted above Lower Granite Dam. These water rights account for nearly 40% of the average, natural Columbia River flow at McNary Dam during low flow periods.

Worse, the river's present flows do not present an accurate baseline. Ecology has issued approximately 150 water withdrawal permits that remain partially inchoate, and which will further deplete flows as permittees gradually use their full rights. These rights total

about 1600 cfs or approximately 330,000 acre-feet of water. Hence, Columbia River flows will continue to decline, even if the State issued no new water rights.

In addition to existing perfected and inchoate water rights, nearly 1,000 cfs of water has been requested in pending applications for new water rights from the Columbia River (including the ROE appealed herein).

These figures do not include those quantities of water allocated from the tributaries to the Columbia River, including for example, the Pend Oreille, Spokane, Okanogan, Yakima, and Walla Walla Rivers, and hydraulically connected aquifers. Nor has Ecology performed any analysis of the total water budget for the Columbia River basin. Because the state has not required most appropriators to meter and report their water usage, Ecology lacks basic data about actual water usage and the cumulative impacts of the thousands of water rights the state has issued within the Columbia watershed. Nor has Ecology conducted any assessment of the affects that climate change is predicted to have on snowpack and precipitation in the Columbia River, notwithstanding that such information is available and suggests significant reductions in available water during the lifetime of this permit.

In sum, Ecology lacks basic baseline information about the status of Columbia River with respect to past and proposed water appropriations, both individually and cumulatively. Meanwhile, federal flow objectives set for the Columbia River are not being met. Water is not available for new appropriations.

#### *Regulatory and Voluntary Efforts to Restore Columbia River Flows*

State and federal agencies, Indian tribes and individual water users are presently undertaking numerous voluntary and regulatory activities to restore flows in the Columbia River. Issuance of the Quad Cities ROE contradicts and thwarts these efforts.

State-based policies on water resource allocation have eviscerated the treaty resources of the Native American tribes of the Columbia River basin. These tribes, individually and collectively via the Columbia River Indian Tribes Fisheries Commission (CRITFC), have poured significant resources into salmon restoration. Although the tribes possess treaty-based rights to harvest fisheries, and associated instream flow rights, Washington State has yet to even attempt to resolve the water allocation issues associated with these rights. These treaty water rights are not even mentioned in the ROE, much less analyzed, as a senior right to be protected from impairment. Nor has the state undertaken any analysis of the potential economic risk associated with its continued program of degrading and destroying federally-protected treaty rights.

The listing of thirteen species of Columbia River salmonid species under the Endangered Species Act during the past ten years has driven much of the effort by federal agencies to restore flows in the Columbia and its tributaries.

The U.S. Bureau of Reclamation each year provides 427,000 acre-feet of water from Idaho's Upper Snake River basin to benefit flows in the Snake and Columbia Rivers.

BOR obtains this water through leasing arrangements with several Indian tribes and agreements with the states of Idaho and Oregon. BOR also leases, purchases and retires water rights in the Yakima River, a major tributary of the Columbia in order to augment flows.

Under treaty and non-treaty storage agreements, B.C. Hydro of Canada releases 1 million acre-feet per year to improve salmon flow objectives in the Columbia.

The Bonneville Power Administration, in order to mitigate for salmon degradation caused by the Columbia Hydropower System, dedicates hundreds of millions of dollars toward salmon recovery activities each year, including activities specifically directed toward stream flow augmentation. BPA efforts are guided by policies and plans developed by the Northwest Power Planning Council, which is charged under the Northwest Power Act of 1980 to protect and enhance the fish and wildlife resources of the Columbia River basin in balance with hydropower production. Appropriate seasonal flow augmentation has been a major focus of NWPPC's work with BPA and other government agencies.

Also motivated by potential Endangered Species Act liability, several dam owners on the Columbia River have developed Habitat Conservation Plans that incorporate operational constraints and commit significant funding to promote flow augmentation and other restoration activities.

In sum, enormous amounts of funding and operational efforts have been devoted to restoring flows in the Columbia River for the benefit of improving salmon habitat and survival. The Department of Ecology, in issuing the Quad Cities ROE, flaunts these substantive, massive efforts by sister states, federal agencies, and the treaty Indian tribes of the Columbia basin.

#### *Washington State's Columbia River "Program"*

Washington State is also involved in salmon recovery efforts that focus, in part, on flow restoration in the state's over-appropriated rivers. The Governor's Joint Natural Resources Cabinet in 1999 released the "Statewide Strategy to Recover Salmon" that calls for halting the issuance of new water rights until instream flows have been set, promoting stream flow restoration in rivers where flows are a limiting factor for ESA-listed species, and pursuing opportunities to lease and purchase water rights for the purpose of improving flows for fisheries. Ecology has recently developed a program of water right purchases, but apparently for the purpose, as here, of aiding private interests and new development.

In 1980, Ecology adopted instream flows for the Columbia River in WAC Ch. 173-563. Those minimum flows soon proved inadequate and in the early 1990's, Ecology established a moratorium on issuance of new Columbia River water rights. The State Legislature lifted the moratorium in 1997 and Ecology promised to adopt new rules setting appropriate instream flows and other management strategies for the Columbia. After several years of no action, CELP petitioned for rulemaking in 2000. That petition was resolved with a promise from the Governor's Office to establish the Columbia River

Initiative, a stakeholder-based planning group. Subsequent lawsuits from would-be Columbia River water users, including the Quad Cities, delayed action.

In 2001 Washington experienced a severe drought. Irrigators in the Columbia River basin who had received permits after 1980 were informed that their water diversions must be curtailed to ensure that the 1980 minimum flows would be met. At the last moment, however, Ecology Director Tom Fitzsimmons invoked the “overriding public interest” exception to the regulation, allowing private irrigators to continue diverting from the Columbia even though the NMFS flow objectives were not met for several months of that summer. This action starkly illustrated Ecology’s policy with respect to Columbia River water rights, a policy that has been implemented in the Quad Cities ROE: out-of-stream uses will always take precedence over protecting instream flows. Such an approach to water permitting violates statutory mandates to ensure that Washington’s rivers retain adequate base flow to support fisheries and other environmental values.

In October 2002, Ecology announced it was moving forward with the Columbia River Initiative and would soon commence a process for rulemaking. Ironically, the description of the Initiative touts it as a process for obtaining much-needed science for decision-making, information that is lacking in the Quad Cities ROE. Among other activities, the State has contracted with the National Academy of Sciences to examine the economics of instream versus out-of-stream uses of water. Such an economic analysis is invoked in the Quad Cities ROE, but was never actually conducted. Ecology’s decision to issue the Quad Cities water right absent adequate scientific and economic analysis is inappropriate and in violation of state law.

#### *The Quad-Cities ROE Mitigation Plan*

Ecology justifies its issuance of the Quad Cities ROE by imposing a requirement that the Cities mitigate some but not all of their new water usage. The mitigation plan is unprecedented and unsupported in Washington water law.

For example, mitigation conditions are premised on a “consumptive use” quantification of the right, yet Washington law does not authorize this type of quantification for new water rights. The ROE contemplates use of as-yet undefined mitigation for future allocation under the permit. That mitigation may involve flow augmentation or some other type of out-of-kind, non-flow activities. The mitigation conditions appear to assume that vast quantities of water will be available for purchase to offset not only the impacts of this water right, but of the other Columbia River water rights that pre-date the Quad Cities application. Yet there is no analysis whatever to support the availability of water for sale, or indicate the feasibility of such a massive water marketing program. The mitigation plan also commits the use of public funds, earmarked for salmon restoration efforts, to purchase trust water rights for the benefit of residents and industries in the Quad Cities service area. The ROE also relies upon an untested device, the use of future orders and serial certificates, to define the water right at future dates. Such an approach is not supported in the statutes. Ecology recently offered and then withdrew a similar rulemaking proposal for inchoate certificates.

In summary, the Quad Cities ROE relies upon a variety of legal and regulatory devices that have never before been employed to define a water right, have no basis in policy,

regulations or statute, and have not been analyzed for environmental impacts or economic and technical feasibility. They are, in short, speculative and inappropriate as a basis for issuing a municipal water right upon which the Quad Cities intend to plan and serve future growth for the next fifty years.

### **C. History of Application S4-30976**

#### *Procedural*

On September 23, 1991, the City of Richland applied for a permit to withdraw surface water from the Columbia River. Its project called for using four 1750 horsepower pumps and a 15,000-foot long, five-foot diameter pipeline to divert a continuous 178 cfs (80,000 gallons per minute) to a major industrial customer and other commercial and municipal uses within the city limits. However, on February 27, 1992, the City of Richland notified Ecology that it had decided to “abandon this water right application at this time. It appears that the development of the Horn Rapids Industrial Park will take longer than anticipated and we do not want to burden the Department of Ecology with reviewing the water right application until the development requirements and the time schedule are better defined.” (February 27, 1992 letter from Roger G. Wright, P.E. to State Department of Ecology Water Resources Program.)

The file suggests that the City later changed its mind and Ecology continued to process the application, resulting in the issuance of a twelve-month-long Preliminary Permit dated April 26, 1993. Among other things, the preliminary permit indicated that the city was involved in comprehensive planning for development of its new industrial park, and stated:

“It seems prudent from a water resource management perspective that there must be substantial evidence to support an allocation of such a large quantity of water. Satisfying the review required of the State Environmental Procedures Act (SEPA) will also require some of the same definitive information.”

Conditions of the preliminary permit included comprehensive planning to determine the extent and nature of the development, and water requirements of the likely businesses. Ecology’s surface water application “Progress sheet” in the permit file is stamped “Rejected - 10/30/96”, apparently because the city failed to fulfill preliminary permit conditions.

On June 8, 1997, the application was reinstated and the name of the applicant was changed. The file is marked “Administrative Change to The Cities of Kennewick, Pasco, Richland, and West Richland”, but the legal mechanism by which this occurred is unclear. An “Assignment of Application or Permit to Appropriate or Store Water” executed on June 2, 2000 between Richland and the Quad Cities does appear in the file. This document states that it relates to the “Regional Water Supply area, including the Urban Growth Area for the four cities, as shown on Exhibit 2-1 from the Regional Water Supply Plan.”

On June 26, 2000, Ecology determined that it had erroneously reinstated the application in 1997, and that the Quad Cities request for water rights was no longer valid. The Quad Cities thereafter filed a complaint in Benton County Superior Court, (file No. 00-2-01772-1), and obtained a ruling in March 2001 stating that the application was valid. More recently in the same case, the cities won a court “Order Requiring Performance” dated November 15, 2002. This directed Ecology “to approve and issue” before November 25, 2002 the version of the draft ROE attached to a Joint Status Report.

Among other things, this superior court order is in apparent violation of the priority principle that governs water rights in Washington State. Because the Quad Cities application was junior to several pending applications, Ecology could not issue the permit without the permission of those senior applicants, who had also sued the agency over issuance of their pending permits. That lawsuit, also in Benton County Superior Court, was settled in November 2002 via an unorthodox and arguably illegal agreement to allow would-be water-users to purchase uninterruptible water rights for \$10 per acre-foot. The validity of the Quad Cities ROE is dependent, in part, on this agreement.

Meanwhile, on April 19, 2001 the Washington Legislature enacted SB 5333, which is now codified in RCW 90.03.290(2)(b) of the Water Code. The new statutory language reads:

RCW 90.03.290(b) For any application for which a preliminary permit was issued and for which the availability of water was directly affected by a moratorium on further diversions from the Columbia River during the years from 1990 to 1998, the preliminary permit is extended through June 30, 2002. If such an application and preliminary permit were canceled during the moratorium, the application and preliminary permit shall be reinstated until June 30, 2002, if the application and permit:

- (i) Are for providing regional water supplies to more than one urban growth area designated under chapter 36.70A RCW and in one or more areas near such urban growth areas, or the application and permit are modified for providing such supplies, and
- (ii) Provide or are modified to provide such regional supplies through the use of existing intake or diversion structures.

The authority to modify such a canceled application and permit to accomplish the objectives of (b)(i) and (ii) of this subsection is hereby granted.

According to the ROE, Ecology viewed the passage of SB 5333 as reinstating the Quad Cities application and extending the preliminary permit, and acted upon this statutory mandate accordingly.

On November 19, 2002, Ecology issued the Report of Examination that is the subject of this appeal. The ROE proposes to grant the Quad Cities the right to withdraw 178 cubic feet per second from the Columbia River. The withdrawal will occur through various existing and proposed diversion structures, and will serve the Quad Cities’ municipal water service areas as they expand over the coming 48 years.

### *Environmental Review*

Ecology did not perform its own independent SEPA analysis of this application.

In 1997, the City of Pasco, serving as lead agency, issued a Determination of Non-Significance for the proposed Quad Cities regional water use plan. However, two years later it issued a Determination of Significance, and after several drafts, it issued a “Supplemental Final Environmental Impact Statement – Diversion of Water from the Columbia River by the Cities of Kennewick, Pasco, Richland, and West Richland”, in June, 2000. This document references and incorporates a Regional Water Supply Plan (RWSP) for the Quad Cities, “which contains much of the key information related to this Final SEIS”. An array of mitigation measures, including a “no mitigation alternative except for conservation”, is listed in an appendix. The specific mitigation contained in the Quad Cities ROE, that is, Ecology donating 8cfs of trust water rights from the Lower Walla Walla River, is not mentioned or discussed.

## **V. GROUNDS FOR APPEAL**

CELP contends that Ecology’s issuance of its Determination and Order in the Quad Cities ROE violates state statutes and rules governing the issuance of surface water permits in general, and from the mainstem of the Columbia River in particular. Ecology has unlawfully failed to adequately explore and assess environmental impacts, failed to require appropriate mitigation and water conservation conditions, and failed to perform the required analysis of economic and public welfare interests. Further, Ecology has improperly processed and acted-upon an application that had already expired and was otherwise legally flawed.

The errors identified below are grouped into general issue categories. Individual statements may apply to more than one category.

### **A. Application Processing**

1. Richland’s original application for water right was premised on use within Richland city limits and in contemplation of a specific major industrial customer, i.e., a power generation plant in Horn Rapids Industrial Park. Subsequent changes in the application and granting of the proposed water right to the Quad Cities for general municipal, industrial and commercial purposes is invalid.
2. RCW 90.03.290(2)(b) had the effect of reinstating the Quad Cities application only until June 30, 2002. The ROE was issued November 19, 2002, after the application was no longer valid. Granting this water right to the Quad Cities exceeds the agency’s statutory authority and is illegal.

3. RCW 90.03.290(2)(b) limits diversion points to existing intake or diversion structures. The Quad Cities' ROE illegally allows water diversions to occur at locations other than, and in addition to, existing intake or diversion structures.
4. The "six-year review" process for allocation and certification of future quantities under the proposed permit illegally excludes public processes for review, comment and appeal.
5. The waiver by prior applicants of their rights to have their applications processed in advance of the Quad Cities application is predicated on an agreement that violates various provisions of the state water code. Invalidation or rescission of that agreement will render the processing of this application invalid.

## **B. Water Availability**

1. Ecology has failed to conduct an analysis to determine the amount of water available from the Columbia River based on mainstem flows, groundwater recharge, in-state and out-of-state tributary contributions and other factors, as offset by prior water rights, including but not limited to claims, permits, certificates, exempt well withdrawals, treaty and compact obligations, and environmental requirements, including the state and federal Clean Water Acts, the Endangered Species Act, and the requirements of state law pertaining to retention of base flows necessary to preserve wildlife, fish, scenic, aesthetic and other environmental values. In sum, Ecology has not conducted a water budget for Columbia River and other necessary analysis to determine whether any water is available for new appropriations from the Columbia River.
2. The Quad Cities permit will be explicitly subordinated to applications not yet processed but which are prior in time. Ecology has failed to provide any analysis of the cumulative effects of granting all of the pending applications.

## **C. Detriment to the Public Interest**

1. Ecology has failed to undertake its own analysis and assessment of detriment to instream flows and the aquatic environment of the Columbia River caused by the issuance of this and other permits.
2. Ecology has failed to analyze and assess water quality impacts of this proposed withdrawal. The Columbia River does not meet federal and state Clean Water Act water quality standards for both numeric criteria and characteristic uses, due, in part to the impacts of reduced flows.
3. Ecology has failed to incorporate conditions adequate to address recommendations obtained during the consultation process regarding adverse effects of the proposed

water withdrawal on endangered and threatened species, water quality, and instream flows for fisheries and other purposes as required by RCW Ch. 90.03 and 90.54.

3. Ecology has failed to consider or assess impacts on the McNary National Wildlife Refuge and Hanford Reach National Monument, which lie adjacent to or within the parameters of the proposed water diversion points. Ecology failed to consider potential impairment of the public interest in protecting these national treasures, or of the values associated with the wildlife and endangered species that inhabit these reserves.
4. Ecology's adventurous approval of speculative and unproven mitigation methods is contrary to the public interest, and sets a harmful pattern and precedent for future river management and policy decisions.
5. The open-ended, 48-year schedule for diverting massive quantities of water without guidelines or controls for how or where it will be used invites unbridled urban and industrial growth without sufficient impact analysis and appropriate planning.
6. RCW 90.54.020(2) requires consideration of economic benefits and costs of the proposed water allocation. Ecology's economic cost/benefit analysis contained in the ROE is entirely deficient. For example, it contains no analysis of overall economic impacts of the large water withdrawal proposed in this application; no weighing of costs versus benefits for the various anticipated uses; no discussion of what types of commercial and industrial uses are anticipated to be served by the proposed water withdrawal; no discussion of foregone economic opportunities associated with retaining the water in-river; and no analysis of how increased water diversions in the Quad Cities area could impact navigation rights, Native American fishing rights, impair treaty obligations with tribes and Canada, and potentially impair the economic interests of adjacent states.

#### **D. Beneficial Use**

1. Future uses through the year 2051 are speculative and ill-defined, and there is no satisfactory legal showing that the appropriated water will be put to beneficial use.
2. The quantity proposed for allocation under the ROE is not supported by credible demand projections.
3. The "six-year review process" described as the means for assessing future water allocations and mitigation is an unenforceable condition that will result in allocation of quantities in excess of actual need, and without adequate mitigation.
4. RCW 90.54.020(7) and WAC 173-563-060 require use of water use efficiency and water conservation practices as a potential substitute for new water requirements, particularly for Columbia River withdrawals. The ROE contains some conservation-

related conditions associated with the proposed water withdrawal, but is deficient because it does not require methods that are necessary to ensure reasonably efficient use of water in an arid region, e.g., pricing strategies, per capita usage targets, or landscape irrigation efficiency practices.

5. The first six-year increment of water usage is based on the June 2000 Regional Water Supply Plan, which contains no enforceable or reliable conservation elements. Evidence exists that excessive waste of water is occurring within existing municipal systems in the Quad Cities. For example, Pasco will be the first of the four cities to withdraw water under this permit, but its Municipal Code has required irrigation of public and private landscaping projects that wastes water, especially in times of drought. Water rights may not be granted to a water user who is making or will make unreasonably inefficient use of the water.

## **E. Water Right Parameters**

1. The assignment of Richland's original application among the four cities does not create an entity legally capable of executing or being held accountable for the conditions of the proposed permit.
2. The evolution of this application is replete with nebulous and ever-changing descriptions of diversion points and places of use. For example, the diagram incorporated in the ROE, namely, "Figure 1, Regional Urban Service Area and Water Withdrawal Facilities" is a new diagram not attached to earlier documents such as the Water Resource Plan, and it shows diversion points that are not fully described, justified as necessary, or evaluated for potential adverse environmental impacts.
3. The diversion points contained in the ROE violate the requirements of the Water Code, RCW 90.03.290(2)(b)(ii).

## **F. Mitigation**

1. The trust water rights proposed as mitigation for the first incremental 10cfs are intended to provide mitigation in a downstream tributary as mitigation for upstream impacts in the Columbia's mainstem. There is no mitigation proposed for impacts that will occur within the reach of the river where the withdrawals will take place.
2. Where and how the Quad Cities will mitigate for future withdrawals after the first six-year increment of water usage, is vague, speculative and infeasible.
3. Return flow from municipal wastewater treatment facilities cannot be used as a basis to support the ROE's proposed mitigation.

4. The initial mitigation of 8 cfs for 10 cfs diversion, based on consumptive use analysis, is not supported in the law and fails to fully offset all of the impacts of the proposed water withdrawal.
5. The trust water rights proposed for mitigation have not made full beneficial use of the quantities attributed to them, may themselves be pro-ratable during low water years and therefore not available for mitigation, and have been committed as mitigation for other projects.
6. The use of public funds to purchase, provide, and maintain trust water rights in perpetuity as mitigation for the proposed water withdrawal is an illegal commitment of public funds. Ecology exceeded its legislative authority in expending and committing funds for this purpose.

## **G. State Environmental Policy Act Claims**

1. Ecology's water permit decision violates the requirements of the State Environmental Policy Act, RCW Ch. 43.21C, WAC Ch. 197-11, and the implementing policies and regulations of the Department of Ecology.
2. The Quad Cities proposed water permit is a major action requiring full review under the State Environmental Policy Act. Ecology failed to conduct the necessary independent SEPA evaluation. Ecology's reliance upon the Quad Cities FSEIS is misplaced and not valid to support SEPA requirements.
3. The mitigation conditions contained in the ROE make no reference to Ecology's policies, plans or regulations in support of the agency's exercise of substantive authority to condition the permit. Future mitigation measures are not identified; and, to the extent they are expected to involve additional purchase and retirement of existing water rights, they are not reasonable and are not capable of being accomplished. Ecology has failed to prepare and publish a document identifying its SEPA policies with respect to water resources decision-making.
4. The Quad Cities FSEIS, which was prepared to support the issuance of the Quad Cities' Regional Water System Plan and which is identified in the ROE as "supporting" the Ecology water permit decision, does not adequately address the impacts of the proposed water withdrawal. Substantial differences exist between the ROE and the FSEIS project plan as to diversion points, mitigation proposals and project components, but there is no supplemental document analyzing the impacts of these changes. The ROE does not address all of the alternatives presented in the FSEIS, particularly the "no action" alternative, which itself does not adequately analyze alternatives to a new water withdrawal (e.g., purchase and transfer of existing rights). The FSEIS does not address the direct, indirect and cumulative impacts of the proposed action.

5. The FSEIS states that it is supplemental to a federal EIS prepared in relation to the federal hydropower system on the Columbia River. The adoption of the previous federal EIS is not appropriate to the action at issue here and renders the FSEIS as legally insufficient. Neither document may serve as a substitute for Ecology's environmental analysis of the proposal.
6. Neither the ROE nor the FSEIS addresses the cumulative effects of multiple diversions from the Columbia River, including the 11 or more applications that are being "batch processed" by Ecology.

## **VI. RELIEF REQUESTED**

Appellant seeks an order of the Board determining that the Department of Ecology's Determination and Order in Surface Water Right Application No. S4-30976 is invalid, and vacating the issuance of any permit resulting therefrom. Appellant also seeks any other such relief as may be justified under the law and the facts.

Appellant reserves the right to amend its appeal in any respect, and to plead and present additional legal theories and errors over those alleged here, and to request that the pleadings be amended to conform to the evidence.

Appellant requests that all further notices and pleadings in this matter be served upon its attorney at the address given in Section I, above.

Dated this \_\_\_\_\_ day of December, 2002

By: \_\_\_\_\_  
Shirley Waters Nixon, WSBA #25756  
Attorney for Appellant, Center for Environmental Law & Policy